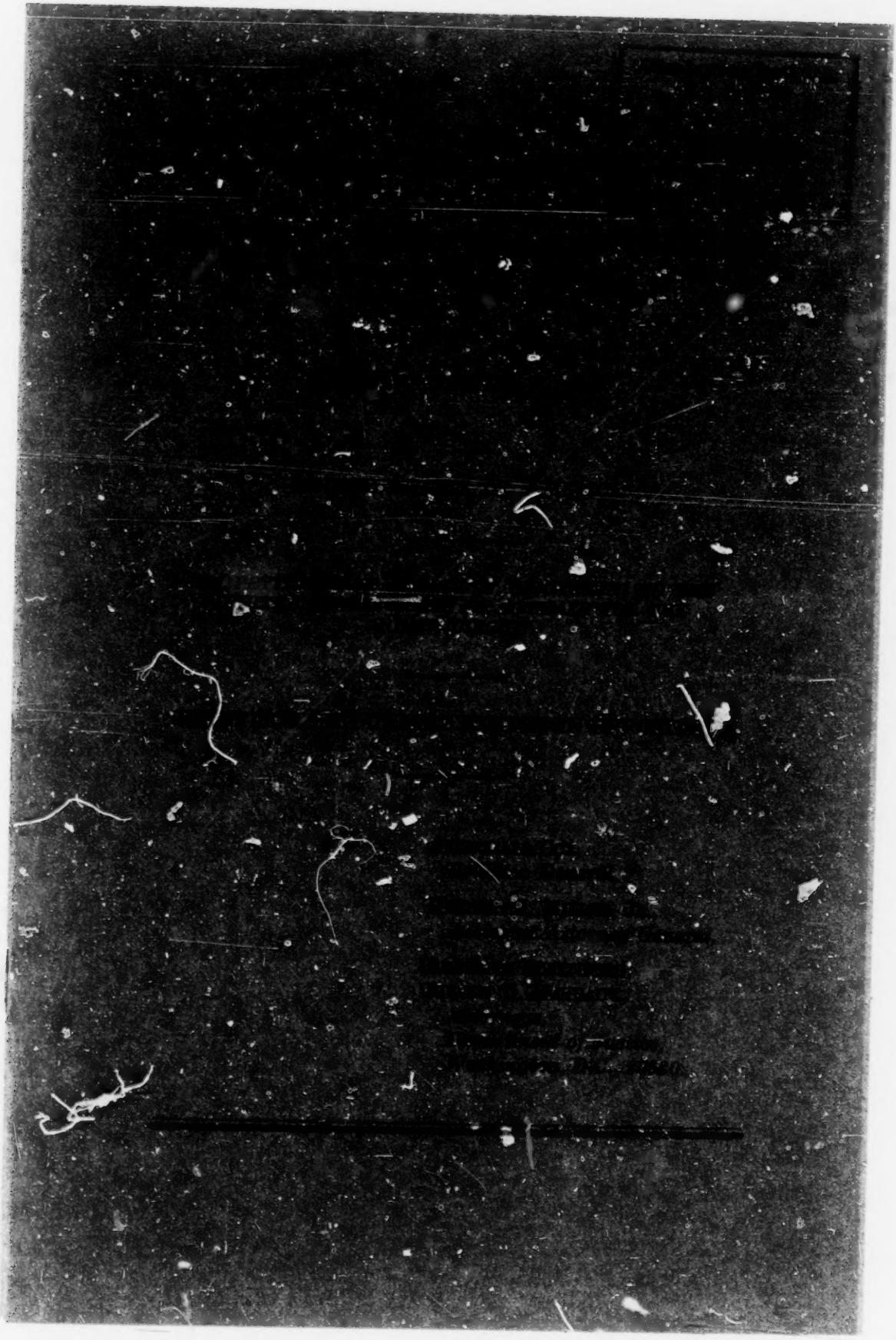

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 953

EARL HUNTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. I, 29-30; Pet. App. 1-3) is reported at 339 F. 2d 425.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1964 (R. I, 31; Pet. App. 4). A petition for rehearing (Pet. App. 5-11) was denied on February 4, 1965 (R. I, 32). The petition for a writ of certiorari was filed on March 4, 1965. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a narcotics agent who, by means of a listening device, overheard conversations between petitioner and a government informant wearing a concealed electronic transmitter was properly permitted to testify as to these conversations.

2. Whether another agent, who overheard one of these conversations while standing close to the open front door of petitioner's residence, was properly permitted to testify as to this conversation.

3. Whether petitioner was represented by counsel at his arraignment.

4. Whether this Court should reconsider its rulings upholding the validity of the statutory presumption of illegal importation arising from possession of narcotics.

5. Whether the evidence was sufficient to show petitioner's possession of narcotics.

STATEMENT

Petitioner was charged in a two-count indictment in the United States District Court for the Southern District of California with the concealment and sale of heroin in violation of 21 U.S.C. 174 (R. I, 3, 4). In a jury-waived trial, the court found petitioner guilty on both counts (R. I, 16; R. II, 92). Petitioner was given concurrent sentences of imprisonment for ten years on each count (R. I, 19; R. II, 112). On appeal

the conviction was affirmed (R. I, 20, 31; Pet. App. 4).

Government evidence adduced at the trial showed that on May 14, 1963, at about 5:00 p.m., an informant named Alexander called petitioner at his residence from a Los Angeles telephone booth. Agent Lipshutz was with Alexander and listened to the conversation (R. II, 14-16, 46(a), 59-60). Alexander told petitioner that the person about whom he had spoken "did not want to give up the money unless he had the merchandise first." Petitioner said, "O.K. Come on over" (R. II, 17, 61). Agents Lipshutz and Sherman then searched Alexander, attached an electronic transmitting device to his body (R. II, 18, 46(a), 61-62), and drove with him to petitioner's residence (R. II, 19, 46(a)-47). After they had parked the car, petitioner, who was standing on the lawn, asked Alexander to come into the house with him, and Alexander did so. Meanwhile Sherman approached the door, which had been left ajar, and overheard the ensuing conversation between petitioner and Alexander (R. II, 19-21, 47-48). Petitioner said that he did not want to meet anyone and warned Alexander never to bring anyone to his house. Petitioner informed Alexander that the package was on the right side of a wash basin in the men's room of a service station at 22nd and Vermont; he also gave Alexander a leather jacket and told him to put the money in the jacket and return it (R. II, 21-22, 49-50, 63). This conversation between petitioner and Alexander was also overheard by agent Lipshutz, who was listening to an electronic receiving device while seated in the automobile (R. II, 62-63). At petitioner's trial

Alexander and the two agents testified to the conversation.

Alexander and agent Sherman then drove to the service station men's room at 22nd and Vermont. Under the wash basin Sherman found yellow and white balloons, each containing heroin, wrapped in face towels (R. II, 10-12, 23-25, 50-52). Alexander and Sherman drove to a prearranged location where they met agent Lipshutz. Sherman conducted a field test for heroin which proved positive and then put $300 into a pocket of the jacket petitioner had given to Alexander, who was again searched (R. II, 26, 54-56, 65).

Alexander, who was still wearing the electronic transmitting device, then drove alone to petitioner's residence (R. II, 26-27, 56, 65). He parked his car, and petitioner came out of the house. Alexander told petitioner that the reason he took so long was that the purchaser wanted to test the stuff. Alexander gave petitioner the jacket containing $300, told him that the fellow was satisfied with the stuff, and said that if petitioner kept it that way the fellow would continue to do business with him. Petitioner said, "It will go the same way as any other time, just like it did today." Agent Lipshutz, who overheard this conversation on an electronic receiving device while seated in an automobile, also testified with respect thereto (R. II, 27, 65-67).

Petitioner testified on his own behalf that on three or more occasions prior to May 14, 1963, Alexander had asked him to procure narcotics, but he had refused (R. II, 72). Petitioner said that his source for

heroin was a man named "Skinny" (R. II, 80). According to petitioner, he did not know who put the heroin in the service station; his contact told him over the telephone where the heroin would be located and petitioner informed Alexander of this location (R. II, 81-83).

ARGUMENT

1. There was no error in receiving into evidence, without defense objection, agent Lipshutz's testimony as to two conversations overheard on the receiving device while he was seated in his automobile. The evidence was received in corroboration of the testimony of Alexander, who was a witness at the trial. The fact that the first conversation took place in petitioner's home, where Alexander was present at petitioner's invitation for the purpose of arranging a sale of narcotics,[1] did not prevent Alexander from testifying with respect thereto. There was thus no reason to exclude the corroborative evidence obtained by a device carried on Alexander's person with Alexander's consent. *Lopez* v. *United States*, 373 U.S. 427. There is no meaningful distinction between the minifon recording device involved in *Lopez* and the transmitter involved in this case, and no distinction has been drawn in the decisions. *United States* v. *Pasquinzo*, 334 F. 2d 74 (C.A. 6); *Maddox* v. *United States*, 337 F. 2d 234 (C.A. 5).

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[1] No arguable issue of privacy is involved in the second conversation which occurred at Alexander's car parked near petitioner's home.

2. Nor did the district court err by receiving in evidence, without defense objection, agent Sherman's testimony regarding the conversation he overheard between petitioner and Alexander in petitioner's home. The record does not support petitioner's claim that Sherman was a trespasser. After Alexander telephoned petitioner to say that the person he had been talking about did not want to surrender his money until he obtained the merchandise, petitioner told Alexander to "come on over." When Alexander appeared with Sherman, petitioner apparently believed that Alexander was purchasing heroin for Sherman. Consequently, Sherman was on petitioner's premises at least with petitioner's implied consent,[2] and petitioner made no order or demand that Sherman leave. Petitioner did not invite Sherman into his house, but he could have closed the door so that his conversation with Alexander might not be overheard. Instead petitioner left the door open, thereby enabling Sherman to overhear the discussion. In any event, since petitioner presumably anticipated that Sherman would go with Alexander to find the narcotics where they had been hidden, it is reasonable to assume that petitioner had no objection to Sherman's hearing the location at which the narcotics could be found.[3]

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[2] The court below, in observing that the record did not show that Sherman was a trespasser, stated that for all that appeared, Sherman may have been standing on a public sidewalk (Pet. App. 2).

[3] The situation here is unlike that in *People of State of California* v. *Hurst*, 325 F. 2d 891 (C.A. 9), and in *Brock* v. *United States*, 223 F. 2d 681 (C.A. 5), where the officers

3. Relying upon *Hamilton* v. *Alabama*, 368 U.S. 52, and *White* v. *Maryland*, 373 U.S. 59, petitioner claims that he had no counsel at arraignment (Pet. 15-20). The record shows, however, that when petitioner appeared before the court on August 12, 1963, for arraignment and plea without counsel, he merely stated his true name as set forth in the indictment, and the court ordered the case continued for plea (R. I, 5). Petitioner appeared on September 9, 1963, with counsel, and pleaded not guilty to both counts of the indictment (R. I, 6). The purpose of arraignment, as made clear by Rule 10, F.R. Crim. P., is to inform the accused as to the charges alleged and obtain a plea to the charges.[4] Petitioner was represented by counsel when this was done.

4. The statutory presumption of 21 U.S.C. 174 which petitioner attacks—*i.e.*, that unexplained proof of possession of narcotics supports a conviction for the concealment and sale of unlawfully imported narcotics—was upheld in *Yee Hem* v. *United States*, 268 U.S. 178, was sustained against a more limited challenge to its scope in *Roviaro* v. *United States*, 353 U.S. 53, 63, n. 14, and was assumed to be valid in

came on the accused's premises without his knowledge. In *Brock*, moreover, the officers induced self-incriminatory remarks in answer to suggestive questions addressed to an accused talking in his sleep.

[4] Rule 10, F.R.Crim.P., provides: "Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

Harris v. *United States*, 359 U.S. 19. This Court has repeatedly declined to reconsider its rulings with respect to the validity of that presumption. See *Agobian* v. *United States*, 323 F. 2d 693 (C.A. 9), certiorari denied, 375 U.S. 985; *White* v. *United States*, 315 F. 2d 113 (C.A. 9), certiorari denied, 375 U.S. 821. It has likewise declined to review decisions upholding the more recently created presumption of illegal importation of marihuana (21 U.S.C. 176a) as against a contention that the inference arising from possession is less rational in the case of marihuana than with respect to opium. *Caudillo* v. *United States*, 253 F. 2d 513 (C.A 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931; *United States* v. *Taylor*, 266 F. 2d 310 (C.A. 7), certiorari denied, 361 U.S. 853. There is no reason now for reconsideration of this settled line of decisions.

5. Petitioner's final contention is that he was not shown to have had possession of the heroin so as to bring the presumption into play. Actual physical possession was not necessary, however, so long as there was circumstantial evidence to establish petitioner's dominion and control over the narcotics. *White* v. *United States*, 315 F. 2d 113, 115 (C.A. 9), certiorari denied, 375 U.S. 821; *Rodella* v. *United States*, 286 F. 2d 306, 310-313 (C.A. 9), certiorari denied, 365 U.S. 889; *United States* v. *Buonanna*, 290 F. 2d 585, 587 (C.A. 2); *United States* v. *Malfi*, 264 F. 2d 147, 150-151 (C.A. 3), certiorari denied, 361 U.S. 817. Petitioner told Alexander precisely where the heroin was hidden, and it was found there. These facts suffice to show petitioner's dominion and control over

the heroin, and the court was justified in concluding that he had constructive possession.

Petitioner argues that he merely facilitated or arranged the sale so that his case comes within decisions such as *United States* v. *Jones*, 308 F. 2d 26 (C.A. 2), and *Hernandez* v. *United States*, 300 F. 2d 114 (C.A. 9), where convictions were reversed on evidence that delivery of the narcotics was made not by the accused but by a third person. The trial court in this case, however, could choose not to believe petitioner's testimony, the substance of which was that his unknown contact, or someone acting on the contact's behalf, had placed the heroin in the wash basin. The court, as trier of the facts, could have concluded that the narcotics had been placed under the wash basin by petitioner or upon his instructions.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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